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Supreme Court, U.S.
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No. 95-1707

In The

Supreme Court of the United States

October Term, 1995

TIC UNITED CORP.,

Petitioner,

vs.

RYAN M. PATTON, and KATHY PATTON STRUNK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request the Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Tenth Circuit reported at 77 F.3d 1235 (10th Cir. 1996). For convenience, Respondents will refer to the opinions of the Tenth Circuit, the United States District for the District of Kansas and the Supreme Court of Kansas by referring to the pages designated in the appendix to Petitioner's brief. (A-1-73) For clarification purposes and identity of the parties, please note the Petitioner herein was the defendant Hutchinson Wil-Rich Manufacturing Company in the Kansas Supreme Court case and a subsequent merger resulted in substitution of the parties.

JURISDICTION AND STATUTES INVOLVED

Jurisdiction is proper for this appeal. Respondents acknowledge the Fifth and Fourteenth Amendments to the United States Constitution are being asserted by the Petitioner.

CORRECTION OF MISSTATEMENTS IN THE PETITION

The Petitioner did not simply "purchase some of the manufacturer's assets and/or assume its obligations and liabilities"; it purchased all of the assets, good will and identity of the product line of Wil-Rich cultivators, retained key personnel from the original manufacturer, in particular John Kehrwald, Vice President of Engineering

and General Manager, who has been employed by all corporate entities involved with this model cultivator, and received financial and other benefits from the extensive and long established dealer organization of Wil-Rich dealers.

The suggestion on page 3 of the Petition that the Kansas Supreme Court on certified questions "announced for the first time" a "post-sale duty to warn" ultimate consumers of a defect that was unforeseen at the time of sale is not an appropriate statement of the process or the holding of that court. This decision, while described by the Supreme Court as a "first impression product liability case" (A-47), noted that while the relationship between the Petitioner and the Respondents was distinguishable from well settled and established cases, those cases *did not* signal "rejection of a post-sale duty to warn." (A-61) The interlocutory Supreme Court decision simply followed an established trend in its decisions to extend duties of reasonable care to the circumstances in this case and discussed the steps a manufacturer must take to locate its customers for product warnings as well as whether there was a recognized post-sale duty to retrofit and recall agricultural equipment. (A-15, A-48)

The Petitioner is uncandid in the way it describes the legal successor liability claims with regard to the various corporate entities that were originally defendants. (*See* Petition at 3, 4) The Petitioner flatly misstates the record and the express findings of the trial court and the Tenth Circuit when it suggests the "*Stratton* theory disappeared" by the end of the trial and that this "product line successor" theory of liability was essentially waived by the Respondents. (*See* Petition at 4) This assertion is

incorrect considering the express rejection of the Petitioner's arguments on this precise point by the Tenth Circuit (A-7), when in fact it is the Petitioner that has been found to have waived its right to complain about the failure to submit *Stratton* issues to the jury. (A-7, 8) The *Stratton v. Garvey Int'l, Inc.*, 9 Kan. App. 2d 254, 676 P.2d 1290 (1984) theory of liability has been asserted in this case from the beginning to the end. (A-8) The trial court and defense trial counsel knew this, the Tenth Circuit recognized this and this Honorable Court will as well from a reading of all three of the underlying opinions contained in the Petitioner's Appendix.

It is noteworthy the award of the punitive damages in this case was rendered by a trial judge, not a jury, following strict statutory standards and considerations codified in a "tort reform" era statute, K.S.A. 60-3702, adopted by the Kansas legislature which eliminated the right for a jury to award such damages and placing a limitation on the amount of punitive damages that can be recovered. The amount of the punitive damage award was slightly less than the compensatory damages awarded by the jury and paid by the Petitioner. (A-30-36)

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED DOES NOT PRESENT A COMPELLING REASON OR BROAD CONSTITUTIONAL ISSUE OF GENERAL SIGNIFICANCE THAT NEEDS TO BE ADDRESSED OR DEVELOPED BY THIS COURT

Petitioner argues in points I and III the question presented is one of constitutional significance and one which needs further analysis and development by this Honorable Court. This is not the case considering the treatment of the due process requirements by the courts below. The Tenth Circuit, and for that matter, the trial court recognized the fundamental importance of the notice component of the Due Process Clause in the context of passing upon the award of punitive damages in this case. Had this court done otherwise, then Petitioner might have a bonafide argument. The underlying courts did not and the Petitioner does not.

This case involves neither the civil equivalent of an *ex post facto* law or the retroactive imposition of punitive damages as Petitioner argues. The question as presented to this court incorrectly presupposes the non-existence of a duty, diverting the focus away from the real issue of whether due process was violated. This case presents a well reasoned analysis, based upon established precedent from recent and older decisions, *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (1991); *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697 (1964); and *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S.

482, 35 S.Ct. 886 (1915), that the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damage award might be imposed if egregious conduct occurred. Judge Lungstrum discussed the standards that were applied at the trial level, found "egregious" conduct existed and held this standard was satisfied by the jury's finding of wanton conduct. In fact, the trial court specifically agreed with the jury's finding of wanton conduct. (A-29-30, 32-36)

The Tenth Circuit carefully analyzed the existing authority and proceeded, without difficulty, to fashion a two part test in deciding the Petitioner's due process rights were not violated. The Tenth Circuit made specific factual and legal findings in its analysis and found Petitioner did have sufficient notice that its conduct might be found to be tortious under established Kansas law and Petitioner did have notice punitive damages might be awarded in Kansas for wanton and recklessly indifferent conduct. (A-15-16)

The existing Supreme Court precedent is neither confusing or in need of further development with regard to the importance of the notice element of the Due Process Clause when punitive damages are imposed. This court recently denied the Petition in *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. Cal., 1992), *cert. denied*, 506 U.S. 1080, 113 S.Ct. 1047 (1993) which made a similar "lack of notice" due process argument. In *Waits*, the Ninth Circuit, while noting punitive damages are generally unavailable when an issue is one of first impression or where a right has not been clearly established, held the law was clearly established and the defendants consciously disregarded the rights of others by their conduct.

As previously noted by the Tenth Circuit, Petitioner's continued reliance on *Landgraf v. USI Film Prod.*, ___ U.S. ___, 114 S.Ct. 1483 (1994) is misplaced. (A-13) The case at bar does not involve a retroactive imposition of punitive damages, but rather a logical extension of the duty of reasonable care in a product liability post-sale warnings context. The fact the Petitioner regrettably chose to engage in wanton conduct by totally failing to take any corrective action in the face of repeated and unambiguous field service history evidencing similar catastrophic injury and fatality scenarios is what gave rise to what was a most predictable award of punitive damages.

II.

PETITIONER WAS REASONABLY AFFORDED NOTICE ITS CONDUCT MIGHT LEAD TO A POST-SALE DUTY TO WARN AND THAT AN AWARD OF PUNITIVE DAMAGES MIGHT BE IMPOSED UNDER KANSAS LAW FOR PETITIONER'S WANTON CONDUCT

In order to evaluate the arguments presented by the Petitioner in Section II of its Petition, the court needs to be provided with an additional factual summary to see the established trend and clarity of Kansas law on the points about which Petitioner complains. After reviewing the relevant facts and Kansas cases, this court will reasonably come to one of two conclusions: (1) the Petitioner was either guilty of wanton and recklessly indifferent conduct in failing to provide a post-sale warning relative to the latent hazards presented by the cultivator wings falling without warning under circumstances of hydraulic or other mechanical failure which were unknown to the

operator (which was found by the jury, trial court and the Tenth Circuit) or (2) Petitioner was oblivious to what was transpiring in Kansas product liability law while doing business in the state of Kansas as a farm product manufacturer for three years in advance of Ryan Patton's injury.

Petitioner purchased all of the assets, the good will and identity of the Wil-Rich farm equipment division, product line and established dealer distribution organization from Lear Siegler Diversified Holding Corp. in August, 1987. With this acquisition came all of the incidents of this manufacturing operation including individual engineers and decisionmakers that had been originally employed by Wil-Rich, Inc., the original manufacturer and seller of the cultivator in this case in 1977.[1]

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[1] John Kehrwald is the Vice-President of Engineering and General Manager of the Wil-Rich manufacturing facility in Wahpeton, North Dakota. Mr. Kehrwald was originally employed by Wil-Rich, Inc. in 1976. He has been the decisionmaker for all engineering and safety issues including the decision not to issue any post-sale warnings concerning the Wil-Rich ninety degree wing field cultivators since the date the Patton cultivator was first sold; throughout the ownership of the Wahpeton manufacturing facility by all Lear Siegler entities which ended in August, 1987, the date of Ryan Patton's injury, April 21, 1990, and until the present time under Petitioner's ownership which began in August, 1987. Mr. Kehrwald is the one common denominator over time that resulted in the jury and all courts reviewing the facts of this case to find there was a lack of reasonable care and wanton conduct due to Petitioner's failure to take *any* action with regard to post-sale warnings given the considerable adverse field service history actually known to Mr. Kehrwald, other management and the owner of the Petitioner.

Beginning in the mid to late 1980's, field experience involving the Wil-Rich ninety degree wing field cultivator disclosed that repeated and similar catastrophic injuries and fatalities were occurring. These incidents involved unknown or unrecognized hydraulic or mechanical failure in the linkage holding the wing in the ninety degree upright position while it was secured by a lock pin. In order for the operator to remove the wing lock pin to lower the wing before operating the cultivator, the location of the lock pin bracket required the operator to stand directly under the wing. Once the pin was removed in these situations, the wing would fall without warning and either significantly injure or kill the unsuspecting operator who had performed this same routine hundreds of times before without incident. The wing is so heavy and falls so quickly that an operator cannot run or move fast enough once the wing begins to fall to avoid being crushed or impaled by the wing and cultivator shovels. It is the combination of this scenario and the location of the wing lock pin which defines the latent defect in the cultivator that became known *after* the point of sale and which gives rise to the need for the post-sale warning.

Mr. Kehrwald became personally aware of each of the six injury and fatality accidents that occurred before Ryan Patton was rendered paraplegic by such a similar occurrence.[2] Mr. Kehrwald participated in decisions not to

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[2] The other accidents preceding the Patton injury and the date Mr. Kehrwald became aware of them are as follows: Brinkman (9/29/83); Raitz (7/25/86); Langenfeld (9/2/86); Lipetsky (10/86); John (2/11/88); and Sedler (7/19/89). Mr. Kehrwald investigated all occurrences known to the Petitioner.

provide warning labels or instructions on cultivators manufactured and sold in the 1970's and made the decision on behalf of the Petitioner not to provide any post-sale warnings or instructions for cultivators in the field. No corrective actions of any kind occurred until after the jury rendered its verdict in this case finding Petitioner's failure to act as wanton conduct.

Substantial evidence in this case was introduced regarding the existence, function and the day-to-day operation of the extensive Wil-Rich dealer organization. In particular, the Respondents introduced abundant evidence on the particular Wil-Rich dealer that sold and serviced the Patton cultivator since 1977 and about the continual and close contacts between the Wil-Rich manufacturing facility in Wahpeton, North Dakota, the local dealer and their customers including the Pattons. The local dealer knew precisely where the Pattons and their Wil-Rich equipment were located. The local dealer also knew the names, locations and the models of Wil-Rich equipment that was owned and operated by numerous other farmers who testified at trial. The dealer was shown to be able, with relative ease, to contact these individuals with any necessary safety related information.

Who was in a better position under the facts of this case to have warned the innocent users of this equipment if not the Petitioner who acquired and retained the product name identity, the manufacturing facility, the company personnel, the established dealer organization, the ongoing day-to-day operation of its business and the same decisionmakers? The jury and reviewing courts must have asked themselves this same question and arrived at the same conclusion, namely, the Petitioner is

liable for its negligent and wanton conduct and the corresponding compensatory and punitive damage awards.[3]

A.

Petitioner argues the Federal Court's use of the certification process to the Kansas Supreme Court in this diversity product liability action indicates Kansas cases did not recognize a post-sale duty to warn. Therefore, Petitioner argues it was denied sufficient notice that its conduct by doing nothing with regard to product warnings might expose it to liability under Kansas negligence law or to punitive damages if its continued omissions were judged to be wanton or recklessly indifferent under the circumstances. At first blush, this argument appears to have merit. Upon critical analysis, however, and utilizing the actual record in this case as well as the reported decisions which belie the Petitioner's stated position, the argument withers and raises a more troubling question as to good faith advocacy of this position by Petitioner given the underlying record.

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[3] The Kansas Supreme Court also recognized this reality when it discussed the post-sale duty to warn in the context of arguments made by the Petitioner under K.S.A. 60-3307, a statute relating to the inadmissibility of evidence under the Kansas Product Liability Act. The Kansas Supreme Court stated: "If we were to accept Hutchinson Wil-Rich's view of 60-3307, we would endorse a situation where a manufacturer's knowledge of frequently occurring life-threatening, post-sale hazards in a product free of known hazards at the point of sale would render evidence of those hazards inadmissible when the manufacturer has made no attempt to warn of the hazard." (A-68)

The handling of this issue under pre-existing Kansas common law, first by the trial court and later by the Tenth Circuit in affirming the trial court's ruling on the Petitioner's due process argument challenging the punitive damage award, is made simple and compels the denial of this petition.

Kansas courts have decided a number of cases dating back to 1984 that would "fairly indicate" to anyone reading them that post-sale duties to warn existed in Kansas product liability law, albeit these cases involved ethical drugs, roofing materials and handguns. A reading of these same cases, excepting *Stratton*, "fairly indicated" punitive damages might be imposed in response to egregiously tortious conduct. *Johnson v. Colt Industries Operating Corp.*, 797 F.2d 1530 (10th Cir. 1986); *State ex rel. Stephan v. GAF Corp.*, 242 Kan. 152, 747 P.2d 1326 (1987); *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 718 P.2d 1318 (1986); *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, *cert. denied*, 469 U.S. 965, 105 S.Ct. 365 (1984) and *Stratton v. Garvey Int'l, Inc.*, 9 Kan. App. 2d 254, 676 P.2d 1290 (1984).

In *Wooderson*, the Kansas Supreme Court outlined what was required in order to discharge known duties of reasonable care with regard to pre and post-sale warnings to doctors prescribing ethical drugs. *Wooderson*, 235 Kan. at 399-409. Why is this case important in terms of providing notice of potential tort and punitive damage liability? The court found the drug manufacturer to be an expert (one that possesses superior or technical knowledge of the product) because it had the benefit of technical knowledge as well as the scientific and adverse reaction data related to the drugs involved on an ongoing basis.

Isn't this analogous to a farm equipment manufacturer receiving adverse field service history of similar injury and fatality accidents on an ongoing basis while possessing all of the technical knowledge regarding the engineering design of its field cultivator? The drug manufacturer was held to have a "continuous duty" to keep abreast of developments touching upon the manufacturer's product and to notify those affected by adverse reactions discovered from the use of the product. *See Wooderson,* 235 Kan. at 400. While it might be suggested an ethical drug manufacturer is in a different situation with regard to staying abreast of the scientific literature and adverse reactions data due to the regulatory process involving ethical drugs, it does not take a quantum leap to see the predictable outcome of a scenario where the principles of reasonable care transcend different products and industries when critical safety information is known by a manufacturer who is apprised of field service history about its product and it fails to provide this information to those individuals who are exposed to life threatening hazards that are either unknown or unappreciated by them. Obviously, the farm equipment manufacturer, like the drug manufacturer, is in a position of having superior technical and field service knowledge as compared to the dealer and end user. It is, in part, this disparity in perspective and knowledge that initially brought about the "continuing" or "post-sale" duties to exist with regard to the providing of safety information concerning products.

Wooderson also provided a comprehensive review of the state of Kansas law with regard to the types of conduct that might give rise to the imposition of punitive damages in all contexts, not just those involving ethical

drugs. *Wooderson*, 235 Kan. at 415-416. It is not even arguable that Petitioner could read this decision and not come away with a clear understanding that punitive damages might loom on the Kansas horizon upon a total failure to act with regard to providing post-sale warnings concerning critical safety information when numerous users of its product had met with the same catastrophic fate under similar circumstances. The Petitioner knew what was necessary to discharge its responsibilities in this case and regrettably it chose not to act.

If for some reason the Petitioner misunderstood the teachings of *Wooderson*, then it certainly must have become better informed just four months after it acquired the assets of the Wil-Rich Division and began doing business in Kansas in August, 1987. In December, 1987 *State ex rel. Stephan v. GAF Corp.*, 242 Kan. 152, 747 P.2d 1326 (1987) was decided by the Kansas Supreme Court. *GAF* was primarily a fraudulent concealment case involving another type of product and industry, roofing materials. This case is clear as to what might be the result when a manufacturer fails to provide prompt warnings with regard to a product hazard that becomes known to the manufacturer after the product has been put on the market and it is known that repeated failure and causal injury is occurring in the field. The state of the law in Kansas could not have been misunderstood or misinterpreted by any reasonably informed manufacturer. One who might choose to do nothing with regard to providing necessary warnings was on notice it most probably would be subjected to tort liability for its negligence and to punitive damages for its wanton conduct.

Another product liability case in Kansas involving another type of product gave rise to a punitive damage award in the relevant time frame. *Johnson v. Colt Industries Operating Corp.*, 797 F.2d 1530 (10th Cir. 1986). In *Johnson*, a punitive damage award was affirmed by the Tenth Circuit. This case involved a handgun. The court discussed in detail the state of Kansas law concerning the type of tortious conduct that would give rise to a trier of fact being permitted to consider a punitive damage award. *Id.* at 1536.

If any doubt remained as to whether a succeeding purchaser of another's assets might be liable for failing to warn of a defect in a predecessor's product once the defect came to the successor's attention, such doubt was resolved under Kansas law by the 1984 decision in *Stratton v. Garvey Int'l, Inc.*, 9 Kan. App. 2d 254, 676 P.2d 1290 (1984). This case will be discussed in more detail in Argument C, *infra*, but would any reasonable engineering manager have difficulty answering the question as to what his or her duty is with regard to warning about defects in his or her predecessor's product if the manager knows of the defective condition of the product and there is a relationship existing between the successor entity and the customers of the predecessor entity? The answer is clearly no under the analysis provided by the court in *Stratton, Id.* beginning at 258.

Petitioner persists in mischaracterizing the Kansas Supreme Court's decision in *Patton v. Hutchinson Wil-Rich Manufacturing Company*, 253 Kan. 741, 861 P.2d 1299 (1993) (*Patton I*) in an attempt to create the illusion there has been a retroactive application of a duty, which ultimately resulted in the imposition of punitive damages.

Judge Lungstrum rejected this precise argument when he addressed this point in his decision. (A-28-30)

This same argument was later presented to the Tenth Circuit. The Tenth Circuit began its analysis *de novo* (A-12) and utilized precedent from this court and established Kansas case law. The Circuit Court noted:

> "While *Patton I* does state that the certified questions presented issues of first impression, 861 P.2d at 1303, the questions involved the steps a manufacturer must take to locate its customers and whether Kansas recognized post-sale duties to retrofit or recall dangerous products. *Id.* at 1303-04. The opinion noted that there was "no statutory limitation nor . . . precedential authority" suggesting that Kansas would reject a manufacturer's post-sale duty to warn. *Id.* at 1311. When TIC decided to forego any warning program regarding defects in the Wil-Rich cultivator, it cannot state that its acts, based on the principles of Kansas common law, represented "no departure from any prescribed or known standard of care." *Danaher*, 238 U.S. at 490. (A-15-16)

It is inappropriate for Petitioner to persist in this specious argument. The Petition should be denied.

B.

Petitioner suggests the Tenth Circuit, and by implication the trial court, relied upon inapplicable precedent in arriving at an erroneous decision on the due process issue. The analysis employed by the Tenth Circuit, rejecting Petitioner's arguments with regard to *Southwest Forest Indus., Inc. v. Sutton*, 868 F.2d 352 (10th Cir. 1989) is hardly

subject to criticism since the Court acknowledged the cases addressed by Judge Lungstrum in *Patton v. TIC United Corp.*, 859 F. Supp. 509, 512 (D. Kan. 1994), (*Patton II*), and also found *Southwest Forest* instructive on how to determine whether Kansas common law duties were fairly indicated in the state's case law even though *Southwest Forest* was acknowledged to not address notice under the Due Process Clause. (A-15) The Tenth Circuit then utilized the very cases from this court the Petitioner is relying upon, *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711 (1993) and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (1991), to conduct its evaluation under a two-part test to determine if the award of punitive damages against Petitioner offended due process. Petitioner's Due Process rights were not violated.

The decision of the Tenth Circuit was well reasoned and sound on this issue. The Petition should be denied.

C.

Petitioner's final argument regarding the correct interpretation that should be given to *Stratton v. Garvey Int'l, Inc.*, 9 Kan App. 2d 254, 676 P.2d 1290 (1984) is without merit. First, *Stratton* involved an analysis of whether an independent duty can exist for a successor corporation to warn about defects in a predecessor's product. *Stratton* involved a situation where liability was being sought to be imposed for the predecessor's liabilities, when under the traditional corporate law theory of liability, such liability would not exist. Second, Respondents never contended at trial Petitioner was a

"legal corporate successor" to the original manufacturer, Wil-Rich, Inc. Respondents always contended Petitioner was liable under the *Stratton* theory of liability since it was a successor entity that purchased the assets of the Wahpeton, North Dakota manufacturing facility (Wil-Rich Division), and assumed liabilities and debts related to those assets by its agreement with the transferor, because Petitioner did not have a sufficient nexus to make it a "legal successor" in order to enforce liability under *Comstock v. Great Lakes Distributing Co.*, 209 Kan. 306, 496 P.2d 1308 (1972). Nonetheless, Respondents successfully asserted and proved the "product line successor" theory at trial to the satisfaction of the judge and jury by meeting the burden of proof required by *Stratton*, 9 Kan. App. 2d at 258.

Petitioner ignores the specific holding of the Tenth Circuit, the abundant record contradicting its "abandonment" argument,[4] and the admissions of Petitioner's trial counsel acknowledging Respondents' assertion of liability under *Stratton*[5] when it contends Respondents abandoned the *Stratton* theory of liability prior to verdict. (*See* Petition at 16). The Tenth Circuit expressly found Petitioner waived its objections to the way the trial court addressed and presented *Stratton* issues in its rulings and

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[4] This record is summarized at pp. 10-13 of Appellees' Brief filed with the Tenth Circuit and the record evidence is contained in Aplee. Supp. App. at 1-4, 5, 17-18, 40-42, 95-98, 163-165, 423-462, 465-470, 476-478, 473-484, 493-501, 505-509, 551-552, 634, 694-704, Aplt. App. at 55-62 and TT 1236 and 1228. Also see f.n. 2 at p. 11 of Appellees' Brief.

[5] Aplee. Supp. App. at 496-500.

with the jury. (A-7, 8) No further comment on this point is deserved.

The argument made by Petitioner that there is a significant distinction between the duty imposed by *Stratton* and the duty imposed by *Patton I*, and, therefore, Petitioner should be relieved from the punitive damage award in this case is also misplaced. *Stratton* anticipates warnings may be required of a successor entity when it learns of defects in its predecessor's product. This discovery may not necessarily be as of the time of sale since in *Stratton* the successor entity did not manufacture or construct man-lift devices and "recently discovered" defects may result in the imposition of a duty to warn. *Stratton*, 9 Kan. App. 2d at 256, 258 (1984), *citing Gee v. Tenneco, Inc.*, 615 F.2d 857, 866 (9th Cir. 1980). *Stratton* contemplated and recognized a duty to warn after the point of sale.

It is almost unimaginable the Petitioner argues at this point in this case that its conduct cannot be the subject of punitive damage liability since all conduct must be evaluated as to what was known and foreseeable at the time the product was sold. The Supreme Court of Kansas in *Patton v. Hutchinson Wil-Rich Manufacturing Company*, 253 Kan. 741, 861 P.2d 1299 (1993), logically extended the general common law of Kansas, which had long required a manufacturer to exercise reasonable care, to a specific factual situation which had not previously been considered by the Kansas Supreme Court. The notions of reasonable care require one to act or refrain from acting when it is reasonable to do so under the circumstances. This is true under established case law regardless if it occurs before or after the sale of a product. The decision

to not take action can rise above mere actionable negligence to wanton or recklessly indifferent conduct when one is compelled to act for safety reasons once it is learned repetitive and similar injuries and deaths are occurring due to a latent hazard discovered in a product. Petitioner took not only an unreasonable but, indeed, an unacceptable risk with the lives and well being of its customers. This was done with total indifference to established rules of tort and punitive damage liability. The jury and reviewing courts have found this to be unacceptable conduct on the part of the Petitioner as should this Honorable Court. The Petitioner has failed to articulate any compelling reasons for granting certiorari and the Petition should be denied.

CONCLUSION

For the above and foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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